

# Kirkpatrick & Lockhart LLP

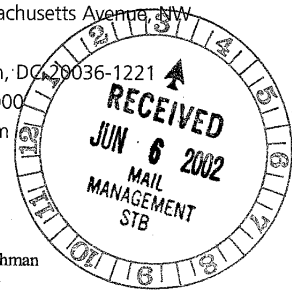
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June 6, 2002

## VIA HAND DELIVERY

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

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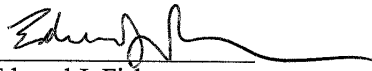
Re: **Finance Docket No. 34192**  
**Hi Tech Trans, LLC – Petition For Declaratory Order**

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **State of New Jersey, Department of Environmental Protection ("NJDEP") Reply to Amended Petition for Declaratory Order** dated June 6, 2002. Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter.

Respectfully submitted,  
Kirkpatrick & Lockhart LLP  
Special Counsel to the NJDEP

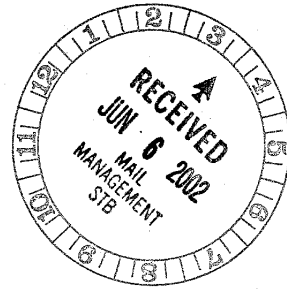
By:

  
Edward J. Fishman

cc: John McHugh, Esq.  
Benjamin Clarke, Esq.  
Jonathan M. Broder, Esq.

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BEFORE THE  
SURFACE TRANSPORTATION BOARD



FINANCE DOCKET NO. 34192

HI TECH TRANS, LLC –PETITION FOR DECLARATORY ORDER

**STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
REPLY TO AMENDED PETITION FOR DECLARATORY ORDER**

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**SPECIAL COUNSEL TO STATE OF NEW  
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ENVIRONMENTAL PROTECTION**

Dated: June 6, 2002

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BEFORE THE  
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34192

HI TECH TRANS, LLC –PETITION FOR DECLARATORY ORDER

**STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,  
REPLY TO AMENDED PETITION FOR DECLARATORY ORDER**

The State of New Jersey, Department of Environmental Protection (“NJDEP”), hereby submits this Reply to the Amended Petition for Declaratory Order filed May 3, 2002 by Hi Tech Trans, LLC (“Hi Tech”). The Surface Transportation Board (“STB” or “Board”) should deny Hi Tech’s request for a declaratory order proceeding because the Eleventh Amendment precludes the STB from issuing the relief requested by Hi Tech. In addition, the STB does not have jurisdiction over the alleged solid waste collection and disposal activities of Hi Tech. Even if the proceeding were not barred by the Eleventh Amendment and the Board had jurisdiction over Hi Tech’s activities, Hi Tech has failed to establish that the State of New Jersey statutes and regulations that it seeks to nullify would be preempted by the ICC Termination Act of 1995 (“ICCTA”).

**PROCEDURAL BACKGROUND**

On April 4, 2002, Hi Tech filed a Petition for Declaratory Order (“Original Petition”) asserting that the Board has exclusive jurisdiction over Hi Tech and that such exclusive jurisdiction nullifies the State of New Jersey’s statutes and regulations governing solid waste management with respect to Hi Tech’s activities. On May 3, 2002, Hi Tech filed an Amended Petition for Declaratory Order (“Amended Petition”) in order to remove Canadian Pacific Railway Company (“CP”) as a party to the petition at CP’s request and to include an argument

under the Hazardous Materials Transportation Act. See John F. McHugh Certification in Support of Application for Leave to Amend Petition at 1-2. In addition, the Amended Petition contains various other modifications from the Original Petition. See, e.g., Hi Tech Amended Petition for Declaratory Order ("HTT Pet.") at 1 (deleting reference to Hi Tech as the "licensed agent" of CP); HTT Pet. at 3 (quoting different language from Hudson County Flow Control Plan). On May 6, 2002, NJDEP informed the Board that it would file a Reply to the Amended Petition by May 23, 2002 in accordance with 49 C.F.R. § 1104.13(a). By decision served May 17, 2002, the Board extended the due date for Replies to June 6, 2002.

### **ARGUMENT**

Hi Tech seeks a declaratory order that the STB has "exclusive jurisdiction over [Hi Tech's] activities and those of its customers" and that such exclusive jurisdiction nullifies the State of New Jersey's solid waste management statutes and regulations with respect to Hi Tech's activities. HTT Pet. at 1. NJDEP respectfully submits that the Board should deny Hi Tech's petition for a declaratory order proceeding for several reasons. First, the Eleventh Amendment to the Constitution precludes the Board from issuing the relief requested by Hi Tech. Second, the Board does not have jurisdiction over the alleged solid waste collection and disposal activities of Hi Tech. Third, Hi Tech has failed to establish that the State of New Jersey's statutes and regulations governing solid waste management would be preempted by ICCTA even if the Board had jurisdiction over Hi Tech's claims. In the alternative, should the Board decide to institute a declaratory order proceeding, it should limit that proceeding to issues (if any) that fall within the Board's primary jurisdiction under ICCTA and should provide NJDEP and other parties with a sufficient opportunity to develop the factual record.

**I. The Board Lacks Subject Matter Jurisdiction Over Hi Tech's Petition Pursuant To The Eleventh Amendment To The Constitution**

The Board should deny Hi Tech's petition because the Board is barred by the Eleventh Amendment from ordering the relief requested by Hi Tech.<sup>1</sup> Although the text of the Eleventh Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, the Supreme Court has consistently reaffirmed that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996). The Eleventh Amendment does not exist solely in order to "preven[t] federal court judgments that must be paid out of a State's treasury." Id. at 58. It also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." Id. (emphasis added).

The Supreme Court recently decided that the same principles also serve to avoid subjecting a State to the coercive process of federal administrative agencies at the instance of private parties. Federal Maritime Commission v. South Carolina State Ports Authority, No. 01-46, 535 U.S. \_\_\_, slip. op. at 14-16 (May 28, 2002). The Court held that the preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities. Id. at 14. The Court stated:

Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency. The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court. In

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<sup>1</sup> The Eleventh Amendment provides as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of Any Foreign State."

both instances, a State is required to defend itself in an adversarial proceeding against a private party before an impartial federal officer.

Federal Maritime Commission, 535 U.S. at \_\_\_, slip. op at 15.

Although theoretically the State of New Jersey is not required to subject itself to the jurisdiction of this Board in the instant matter, it is faced with the Hobson's choice of either doing so, or watching silently as Hi Tech seeks an order nullifying New Jersey's solid waste management laws and regulations, a carefully crafted legislative scheme to protect the health and safety of New Jersey's citizens and the integrity of its environment. The Supreme Court discussed this same situation in the Federal Maritime Commission opinion:

A State seeking to contest the merits of a complaint filed against it by a private party must defend itself in front of the FMC or substantially compromise its ability to defend itself at all. For example, . . . if a party fails to appear before the FMC, it may not then argue the merits of its position in an appeal of the Commission's determination filed under 28 U. S. C. §2342(3)(B)(iv). . . . Should a party choose to ignore an order issued by the FMC, the Commission may impose monetary penalties for each day of noncompliance. See 46 U. S. C. App. §1712(a) (1994 ed., Supp. V). The Commission may then request that the Attorney General of the United States seek to recover the amount assessed by the Commission in federal district court, see §1712(e) (1994 ed.), and a State's sovereign immunity would not extend to that action, as it is one brought by the United States. Furthermore, once the FMC issues an order assessing a civil penalty, a sanctioned party may not later contest the merits of that order in an enforcement action brought by the Attorney General in federal district court. . . . Thus, any party, including a State, charged in a complaint by a private party with violating the Shipping Act is faced with the following options: appear before the Commission in a bid to persuade the FMC of the strength of its position or stand defenseless once enforcement of the Commission's nonreparation order or assessment of civil penalties is sought in federal district court. To conclude that this choice does not coerce a State to participate in an FMC adjudication would be to blind ourselves to reality.

Federal Maritime Commission, 535 U.S. \_\_\_, slip. op. at 17-18  
(emphasis added).

Finally, the Supreme Court has determined that even where there is a “constitutional necessity of uniformity” in a federal regulatory scheme such as in maritime commerce, a federal administrative agency is still barred from adjudicating a dispute between a private party and a State. Id. at 22-23. That is because the Federal Government retains ample means of assuring that States comply with federal law. Id. at 23. In the instant case, the Board remains free to investigate alleged violations of ICCTA, either upon its own initiative or upon information supplied by a private party, and to institute its own administrative proceeding against a state. Additionally, the Attorney General may bring suit in a district court of the United States to enjoin conduct in violation of ICCTA. For these reasons, even if the Board were to reject the instant petition, private parties such as Hi Tech remain perfectly free to complain to the Board about unlawful state activity, and the Board remains free to take subsequent legal action. The only step the Board may not take, consistent with the Supreme Court’s sovereign immunity jurisprudence, is to adjudicate a dispute between a private party such as Hi Tech and a non-consenting State such as New Jersey.

**II. The Board Should Deny Hi Tech’s Petition For A Declaratory Order Proceeding Because The Board Does Not Have Jurisdiction Over Hi Tech’s Alleged Activities**

In its Amended Petition, Hi Tech asserts that it contracts for the shipment of construction and demolition debris and contaminated soils, contracts with truckers to gather such materials from construction sites and then arranges for the transfer of such materials in bulk from trucks to railway cars at a facility located in Newark, New Jersey. HTT Pet. at 1. Hi Tech asserts that it inspects all waste moving through its Newark facility to insure that such materials are “appropriate” for transport and that such materials comply with unspecified federal regulations

relating to the safe handling of such materials. HTT Pet. at 2. Hi Tech asserts that its operation is limited to materials deemed “non-hazardous” under the Hazardous Materials Transportation Act. HTT Pet. at 2.

**A. Hi Tech Is Not A Rail Carrier And Does Not Provide Common Carrier Rail Service Within The Board’s Jurisdiction**

Hi Tech is not a rail carrier and does not provide rail service. Its customers (the shippers and/or receivers of construction and demolition debris and contaminated soils) are not rail carriers and do not provide rail service. Therefore, Hi Tech’s assertion that the STB has “exclusive jurisdiction over its activities and those of its customers” (HTT Pet. at 1) is erroneous. See 49 U.S.C. § 10501(b) (STB jurisdiction extends to “transportation by rail carriers”). Since the Board does not have jurisdiction over Hi Tech’s activities and those of its customers, the basic premise of Hi Tech’s preemption argument fails. On this basis alone, the Board should reject Hi Tech’s petition for a declaratory order proceeding.

**B. Hi Tech Overstates The Scope Of The Board’s Jurisdiction In Order To Bootstrap Its Activities Within The Scope Of Federal Preemption**

In its Amended Petition, Hi Tech vastly overstates the scope of the STB’s jurisdiction. Contrary to Hi Tech’s assertion, the STB does not have “exclusive management of the nation’s transportation system.” HTT Pet. at 12. The STB regulates “transportation by rail carriers” and the remedies that it provides with respect to the rates, classifications, rules, practices, routes, services and facilities of such carriers are exclusive. See 49 U.S.C. § 10501(b). The STB does not, however, regulate the activities of Hi Tech in arranging for truckers to gather such debris from construction sites and to transport that debris to a truck-rail transfer facility. The STB’s jurisdiction does not extend to the activities of the construction companies that generate such construction/demolition debris or the activities of the truckers that haul that debris from



construction sites pursuant to contracts with Hi Tech. The activities allegedly engaged in by Hi Tech precede the transportation of such debris by rail and therefore are not preempted by ICCTA.<sup>2</sup>

In July 2000, Hi Tech filed a notice of exemption under 49 C.F.R. § 1150.32 in order to acquire “operating rights” on approximately 640 miles of CP track. Hi Tech Trans, LLC – Operation Exemption – Over Lines Owned By Canadian Pacific Railway and Connecting Carriers, Finance Docket No. 33901 (STB served July 19, 2000). The notice of exemption was challenged by the United Transportation Union (“UTU”), which described the filing as “most unusual and bizarre.” UTU Petition for Stay of Effective Date, Finance Docket No. 33901 (STB filed July 6, 2000) at 1. The notice was withdrawn soon thereafter by Hi Tech counsel for unstated reasons. More recently, Hi Tech filed its Original Petition in this matter with CP as a named party to that petition. As noted above, CP asked to be removed as a party and indicated that it was not consulted prior to the filing of the petition. In addition, Hi Tech removed the assertion that it is a “licensed agent” of CP from the Amended Petition.

Despite its attempts to imbue its activities with rail carrier status, Hi Tech cannot overcome the fact that it is not a rail carrier and it does not provide rail service. Hi Tech argues that its activities are preempted nonetheless because its activities are part of an intermodal movement that includes rail. The problem with Hi Tech’s argument is that it would preempt all

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<sup>2</sup> Hi Tech also overstates the preemptive effect of the STB’s jurisdiction over “transportation by rail carriers.” Contrary to Hi Tech’s assertion, Congress did not “exempt rail operations from all State and Federal law other than [ICCTA.]” HTT Pet. at 6. It is well settled that various federal laws (including Federal Railroad Safety laws) and various state and local laws (including those promulgated under traditional State police powers) that regulate rail carrier activity are not preempted by the STB’s jurisdiction. See, e.g., Tyrrell v. Norfolk Southern Ry. Co., 248 F.3d 517 (6<sup>th</sup> Cir. 2001)(Federal Railroad Safety Act provisions not preempted by ICCTA); Cities of Auburn and Kent, WA –Petition for Declaratory Order –Burlington Northern Railroad Company –Stampede Pass Line, Finance Docket No. 33200 (STB served July 2, 1997)(state and local restrictions on construction waste disposal by railroads not preempted by ICCTA).

state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation. For example, under Hi Tech's theory, shippers, truckers and freight forwarders would be exempt from state and local health and safety regulations applicable to a product as long as that product was scheduled at some point in the distribution chain to be shipped by rail. The Board should not give credence to Hi Tech's attempt to bootstrap on federal preemption of "transportation by rail carriers" in order to protect activities (such as solid waste collection and disposal) that historically have been subject to state and local regulation. See, e.g., AGG Enterprises v. Washington County, 281 F.3d 1324, 1328 (9<sup>th</sup> Cir. 2002) ("One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety and aesthetic well-being of the community").

### **III. Hi Tech Has Failed To Establish That The New Jersey Statutes And Regulations Are Preempted By The ICC Termination Act**

Even assuming the Board has jurisdiction over Hi Tech's claims, the Board should deny Hi Tech's request for a declaratory order proceeding because Hi Tech has failed to establish that the State of New Jersey statutes and regulations at issue would be preempted. In support of its preemption argument, Hi Tech asserts that the State of New Jersey's solid waste management statutes and regulations (i) are preempted by 49 U.S.C. § 11321(a) (HTT Pet. at 6-8); (ii) are preempted by the Hazardous Materials Transportation Act (HTT Pet. at 8-10); (iii) violate the STB's mandate under the National Environmental Policy Act (HTT Pet. at 10-12); and (iv) are per se unlawful under the Commerce Clause of the Constitution (HTT Pet. at 12-13). As explained further below, each of these arguments is misplaced and fails to justify the institution of a proceeding by the Board to consider the declaratory relief sought by Hi Tech.

**A. Section 11321 Does Not Preempt New Jersey Statutes and Regulations**

Hi Tech asserts that the State of New Jersey's solid waste management statutes and regulations are expressly preempted by 49 U.S.C. § 11321(a). HTT Pet. at 6. Section 11321(a) preempts rail carriers from state and municipal law to the extent necessary to allow such rail carriers to carry out merger, consolidation and control transactions subject to STB jurisdiction under 49 U.S.C. Chapter 113. This provision is not applicable here because Hi Tech, a non-carrier, has not engaged in any merger, consolidation or control transaction under Chapter 113. Therefore, Hi Tech's express preemption and field preemption arguments based on Section 11321(a) are irrelevant.

**B. STB's Alleged Mandate Under NEPA Is Not Violated By State of New Jersey's Statutes and Regulations**

Hi Tech also argues that the New Jersey solid waste management statutes and regulations violate National Environmental Policy Act ("NEPA") mandates that the Board is charged with enforcing (HTT Pet. at 10-12). However, NEPA requirements are not applicable here because Hi Tech is not a rail carrier within the Board's jurisdiction. Even if Hi Tech were a rail carrier subject to Board jurisdiction, NEPA requirements would not be applicable because the Board is not being asked to consider a "major Federal action" by Hi Tech or any other entity. See Friends of the Aquifer, et al. - Declaratory Order, Finance Docket No. 33966 (STB served Aug. 15, 2001)(NEPA environmental review provisions not applicable where Board lacks licensing authority over proposed construction project by rail carrier). Therefore, Hi Tech's NEPA argument is irrelevant.

**C. The Board Does Not Have Primary Jurisdiction Over The HMTA and Commerce Clause Arguments Raised By Hi Tech**

In support of its declaratory order petition, Hi Tech asserts that the New Jersey solid waste management statutes and regulations are preempted by the Hazardous Materials Transportation Act ("HMTA") and are per se unlawful under the Commerce Clause of the Constitution. These arguments should not be considered in determining whether the Board should institute a declaratory order proceeding. These arguments are beyond the purview of the Board's jurisdiction and provide further support for NJDEP's view that a declaratory order proceeding should not be initiated.

**1. United States Department of Transportation Has Primary Jurisdiction Over HMTA Preemption Claim**

Hi Tech asserts that the New Jersey solid waste management statutes and regulations are preempted by the Hazardous Materials Transportation Act ("HMTA"). DOT has primary jurisdiction over HMTA preemption issues and is the administrative agency responsible for implementing and enforcing the federal hazardous material transportation regulatory scheme. See 49 C.F.R. §§ 106-180 (DOT regulations promulgated under authority of HMTA); State of New York By Its Department of Environmental Conservation v. United States Department of Transportation, 37 F.Supp.2d 152 (N.D.N.Y. 1999). Therefore, NJDEP respectfully submits that the STB is not the proper forum to consider such arguments.<sup>3</sup>

**2. The STB Lacks Jurisdiction To Consider Hi Tech's Commerce Clause Argument**

Hi Tech asserts that the solid waste management statutes and regulations are per se unlawful under the Commerce Clause of the Constitution. HTT Pet. at 7-8. First, as a matter of

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<sup>3</sup> In addition, the relevance of the HMTA preemption argument is unclear because Hi Tech asserts that it does not handle hazardous waste. HTT Pet. at 2.

procedure, the Board's predecessor agency, the Interstate Commerce Commission ("ICC"), determined that the judicial system should resolve questions relating to the constitutionality of state laws and regulations under the Commerce Clause. National Limousine Association – Petition for Declaratory Order, MC-C-30186 (ICC decided March 20, 1992)(finding that ICC had no general jurisdiction to consider whether state or local regulations impose an undue burden on interstate commerce in violation of the Commerce Clause). More fundamentally, the Supreme Court has determined that Congress cannot abrogate a State's Eleventh Amendment immunity from private suit:

Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72-73 (1996).

Although the Seminole Tribe opinion refers only to the "judicial power" being restricted, as discussed in Section I above, the Supreme Court's recent decision in Federal Maritime Commission makes clear that the same constitutional restriction applies to federal administrative agencies such as the STB.

**IV. Alternatively, If The Board Decides To Institute A Declaratory Order Proceeding, The Proceeding Should Be Limited To ICCTA Issues (If Any) Raised By The Amended Petition In Accordance With The Procedural Schedule Set Forth Below**

In the event that the Board decides to institute a declaratory order proceeding, that proceeding should be limited to issues (if any) raised by Hi Tech that fall within the Board's primary jurisdiction under the ICCTA.

If the Board initiates such a proceeding, NJDEP respectfully requests that the Board adopt a procedural schedule that will allow NJDEP and other parties an opportunity to develop the factual record. NJDEP anticipates that, if the Board initiates such a proceeding, it will need to engage in discovery in order to obtain further information about Hi Tech's alleged activities. Therefore, NJDEP proposes the following procedural schedule in the event that the Board initiates a declaratory order proceeding:

Close of Discovery Period – 90 days after service of Board decision on whether to institute declaratory order proceeding

Hi Tech Opening Statement – 30 days after close of discovery period

Respondents' Opening Statement(s) – 45 days after receipt of Hi Tech Opening Statement

Hi Tech Rebuttal Statement – 20 days after receipt of Respondents' Opening Statement(s)

#### **CONCLUSION**

For the foregoing reasons, NJDEP respectfully requests that the Board deny Hi Tech's petition for a declaratory order proceeding. To the extent that the Board elects to institute a declaratory order proceeding, NJDEP respectfully requests that the Board limit such proceeding to issues (if any) that fall within the STB's primary jurisdiction under ICCTA and further requests that the Board adopt the proposed procedural schedule set forth above.

Respectfully submitted,

By: 

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(202) 778-9000

Dated: June 6, 2002

**SPECIAL COUNSEL TO STATE OF NEW  
JERSEY, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION**

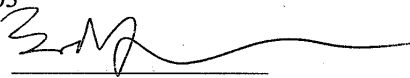
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **State of New Jersey, Department of Environmental Protection, Reply to Amended Petition for Declaratory Order** was served this 6<sup>th</sup> day of June, 2002 via facsimile and overnight mail upon:

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